No. 9527

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In the United States Circuit Court of Appeals

For the Ninth Circuit

GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, ROY A. LAYTON, MILTON LINES, WILLIAM WALDROM, ROY D. WILLIAMS, and J. D. WILKINS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief for Appellants

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Brief for Appellants

STATEMENT OF PLEADINGS AND FACTS

This case arises over the distribution and use of the waters of the Gila River. The Gila River rises in southwestern New Mexico and flows in a westerly direction through the State of Arizona, and empties into the Colorado River at Yuma, Arizona. Beginning at the head of the river, the principal lands in

irrigation lie within: The Virden Irrigation District is in the State of New Mexico at the point where the Gila River enters the State of Arizona; the Franklin Irrigation District embraces the lands in the State of Arizona in Greenlee County, Arizona, bordering on the river immediately after it enters the State of Arizona; the Gila Valley Irrigation District embraces the lands on each side of the Gila River in Graham County, Arizona, approximately forty miles west of the Franklin Irrigation District; the lands embraced within the San Carlos Project, including the Indian lands and the lands of white settlers embraced within the San Carlos Irrigation District, are located in Pinal County, Arizona, beginning below and approximately thirty miles west of the Coolidge Dam.

The San Carlos Dam and Reservoir is located on the Gila River within the San Carlos Indian Reservation and is between the lands embraced in the Virden, Franklin and Gila Valley Irrigation Districts on the east and the lands embraced within the San Carlos Project on the west.

The controversy is between the water users of the Franklin and Gila Valley Irrigation Districts on the one hand and the water users of the San Carlos Project, including the Indian lands, on the other. For the sake of convenience throughout our brief, we will refer to the petitioners in this case and the water users in the Franklin and Gila Valley Irrigation Districts as the "Upper Valley Users," and will refer to the govern-

ment and water users in the San Carlos Project as "plaintiff" or "Lower Valley Users."

The original action out of which the present controversy arose was instituted in the United States District Court for the District of Arizona, being cause No. Globe Equity 59. That action was instituted on the 3rd day of October, 1925, by the United States of America, as plaintiff, and against all water users within the districts named and others using water from the Gila River, as defendants, for the purpose of adjudicating the respective priorities between the Indians and the other users of water on the river. The suit was brought by the United States under the provisions of Section 41, Title 28, United States Code, for itself and as trustee and guardian for the Pima and Apache Indians, occupants and possessors of land with alleged water rights appertaining thereto in the Gila River Reservation and the San Carlos Reservation, and was instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General. The suit was concluded on the 29th day of June, 1935, by the entry of a consent decree. (Tr., Vol. II.)

The decree, as entered, contains the following provision (Art. XII, page 112, Tr., Vol. II):

> "that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly re-

> view such action or order and make such order as may be proper in the premises."

and the further provision (Art. XII, page 113, Tr., Vol. II):

> "that the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being a final determination of the issues of this cause and of the rights herein defined."

The question involved in this appeal arises by reason of a petition filed with the court on July 5, 1939, in said cause, by appellants, pursuant to the provisions of the decree above quoted, seeking a review of the actions and orders of the Water Commissioner specifically complained of in said petition. (Tr., Vol. I, pp. 2-9.)

The United States, on the 9th day of September, 1939, filed its answer to the petition to review the action and orders of the Water Commissioner. (Tr., Vol. I, pp. 10-12.)

The Water Commissioner also filed, on his own behalf, an answer to the petition. (Tr., Vol. I, pp. 12-24.) This answer was stricken upon order of the court. (Tr., Vol. I, p. 25.) Prior to the hearing on the petition, the answer of the Water Commissioner was adopted by the government. (Tr., Vol. I, p. 25.)

Argument was had upon the issues raised by the petition and answers thereto on September 25, 1939 (Tr., Vol. I, pp. 25-26), and the matter submitted to the court for its interpretation of the meaning of the decree. Thereafter and on January 22, 1940, the court

made and filed its Order on Petition to Review the Action of the Water Commissioner, denying relief to the petitioners. (Tr., Vol. I, pp. 26-29.) It was from this order that this appeal is prosecuted. (Tr., Vol. I, pp. 29-30.)

STATEMENT OF THE CASE

In order to present clearly the contention of appellants, it will be necessary to review briefly the history of the case leading up to the filing of the petition on which this appeal is based.

On June 7, 1924, the United States Congress passed the San Carlos Act, authorizing the construction of the Coolidge Dam. (U. S. Statutes at Large, Vol. 43, p. 475.) Subsequent to the passage of the act, and on October 3, 1925, this original action was instituted by the government, seeking to establish the priority of the rights of the Indians to use waters of the Gila River for the irrigation of their lands. In its complaint, the government contended that the Indians had a prior right, as of time immemorial, to the use of sufficient of the waters of the river to properly irrigate approximately fifty thousand (50,000) acres of land. This contention was disputed by the Upper Valley Users, they asserting in their answers that their rights were prior to any other rights on the river, and that any such rights as the Indians might have established prior to their own had been abandoned by

failure to continuously use any definite quantity of water on any specific portion of the land.

With the matter in this status, the controversy was referred by the court to a master for the purpose of taking testimony in order to ascertain the respective priorities of the parties to the action. Extensive testimony was taken until the latter part of the year 1930, when a conference was held by the Upper Valley Users, the Lower Valley Users, the government officials representing Indians' rights, and Secretary Wilbur of the Department of the Interior. At this conference a plan was agreed upon for settlement of the controversy and reduced to writing and approved by the Secretary. (Tr., Vol. I, pp. 85-87.) It provided for the protection of the Upper Valley Users in the irrigation of their lands which have been put to agricultural use prior to the date of the passage of the San Carlos Act in 1924, and that the Upper Valley Users should be entitled to continue the diversion and use of the waters from the Gila River to the extent that such waters were being used and enjoyed in 1924 when the San Carlos Dam was authorized by Congress.

After the conference with the Secretary of the Interior, a decree, containing a description of all the lands embraced within the various districts and the date of their respective priorities to the use of water, was framed and, by consent of the parties, was signed and entered by the court on June 29, 1935. This decree, among other provisions, contains Article VIII (Tr.,

Vol. II, pp. 106-107), which was inserted for the purpose of protecting the Upper Valley Users and carrying out the provisions of the agreement growing out of the Secretary's conference.

The decree provides for the appointment of a Water Commissioner by the court to carry out and enforce the provisions of the decree and the instructions and orders of the court. (Tr., Vol. II, Art. XII, p. 112.) Shortly after the decree was entered, a Commissioner was appointed and entered upon his duties. Within a very short time after the appointment of the Commissioner, a controversy arose over his manner of apportioning waters to the Upper Valley Users.

The manner of apportioning water by the Commissioner, of which the Upper Valley Users complained, is as follows:

On January 1 of each year the Commissioner determined the amount of water then stored in the San Carlos Reservoir and which was available for release through the gates of Coolidge Dam as of that date, and, after allowing for estimated evaporation and seepage, apportioned to the Upper Valley Users an amount of water equivalent to said available stored water then in the San Carlos Reservoir; that thereafter and from time to time during each year after January 1, in making subsequent apportionments to said Upper Valley Users, the Commissioner took into account and made an apportionment to them of only such additional waters as had flowed into the reservoir and remained

therein, and which had raised the elevation of the water within the reservoir since the date of the last apportionment; and that the Commissioner did not take into account all of the water which had flowed into the reservoir since the date of the last apportionment and which was available for release through the gates of Coolidge Dam, less an amount estimated for evaporation and seepage.

The effect of the Commissioner's construction, as approved by the lower court, was that the amount of water to be apportioned to the Upper Valley Users was dependent upon the manner in which the water ran into the reservoir and the manner in which the plaintiff withdrew it therefrom. If the amount of water running into the reservoir did not exceed the amount of water being withdrawn for the use of the Lower Valley Users, then under this interpretation the Upper Valley Users can obtain no apportionments. The practical operation of this construction was that the Upper Valley Users receive apportionments only from flood waters unless the Lower Valley Users saw fit to permit the water which was available to them to remain in the reservoir and raise the level of the lake.

It was and is the contention of appellants that the Water Commissioner, after making the first apportionment on January 1 of each year, should have apportioned to the Upper Valley Users an amount of water equal to *all* water flowing into the reservoir

since the date of last apportionment and available for release through the gates of Coolidge Dam, less an estimated allowance for evaporation and seepage, and regardless of whether the water flowing into the reservoir during the period since the last apportionment had been withdrawn therefrom or had been permitted to remain in the reservoir and caused the elevation of the water in the reservoir to rise.

The Upper Valley Users, upon learning of the manner in which the Commissioner was making apportionments, immediately protested and requested that apportionments be made to them in accordance with their contention as to the meaning of the decree. At the time of making such protest, an opinion of counsel who had assisted in drafting the decree was obtained and served upon the Commissioner. (Tr., Vol. I, pp. 89-96.) Notwithstanding this protest, the Commissioner continued to apportion the water in the same manner he had theretofore pursued with the result that the Upper Valley Users, feeling aggrieved, filed their petition for review of the Commissioner's actions.

The question involved, therefore, is whether or not the Commissioner is correct when, in making apportionments to the Upper Valley Users subsequent to the apportionment of January 1 of each year, he fails and refuses to take into account *all* water running into the reservoir and available for release through the gates of Coolidge Dam, less an estimated amount for evaporation and seepage.

SPECIFICATION OF ERRORS

1. The District Court erred in rendering its certain "Order on Petition to Review Action of Water Commissioner," dated January 22, 1940, denying petitioners any relief and holding that the provisions of the decree of June 29, 1935, authorized the Water Commissioner to make apportionments of water to the Upper Valley Users, after the first apportionment made on the first day of January of each year, by determining the increments of gain in available stored water of the reservoir since the last apportionment was made and adding thereto net bank storage as measured by bank release, and from this total deducting the evaporation losses from the date of last apportionment to the estimated time for use of the apportioned water, and failing to take into account water withdrawn from the reservoir for use by the Lower Valley Users since the date of last apportionment, because the said decree provides that said Commissioner, in making apportionments of water to said Upper Valley Users, after the first apportionment made on January 1 of each year, shall take into account and make an apportionment equivalent to all of the water running into the reservoir since the date of last apportionment and available for release through the gates of Coolidge Dam, exclusive of an appropriate deduction for estimated evaporation and seepage.

2. That the District Court erred in rendering its certain "Order on Petition to Review Action of Water

Commissioner," dated January 22, 1940, holding that the provisions of the decree of June 29, 1935, relating to "stored water" are clear and unambiguous, because if the said decree does not provide and mean that the said Water Commissioner, in making apportionments to the Upper Valley Users, after the first apportionment made on January 1 of each year, shall take into account as stored water all water running into said reservoir since the date of last apportionment and available for release through the gate of Coolidge Dam, less an appropriate allowance for seepage and evaporation, then the provisions of said decree relating to "stored water" are not clear but are ambiguous.

3. That the District Court erred in sustaining appellee's objections to the introduction of evidence offered by appellants to show the true intent and meaning of the decree of June 29, 1935, relating to the apportionment of water to the Upper Valley Users, after the first apportionment made on January 1 of each year. That the said evidence so offered by appellants consisted of Petitioners' Exhibit No. 2 (Tr., Vol. I, pp. 85-87) and Petitioners' Exhibit No. 4 (Tr., Vol. I, pp. 89-96), and the testimony of the witnesses, John L. Gust (Tr., Vol. I, pp. 37-69), J. M. Wilson (Tr., Vol. I, pp. 70-79), William Ellsworth (Tr., Vol. I, pp. 80-84), and Frank McGrath. (Tr., Vol. I, pp. 102-105.)

That the full substance of Petitioners' Exhibit No. 2 is a letter written to the Secretary of the Interior by the Solicitor of the Department of the Interior, dated December 13, 1930, and approved by the Secretary of

the Interior, which letter sets forth the plan for the compromise and settlement of the litigation by providing that the Upper Valley Users should be entitled to continue the diversion and use of the waters from the Gila River to the same extent that such waters were being enjoyed by said Upper Valley Users in the year 1924 when the San Carlos Dam was authorized by Congress.

That the full substance of the evidence offered through the testimony of said witnesses and by Petitioners' Exhibit No. 4 was to show that the witnesses and each of them participated in the framing of said decree of June 29, 1935, and that Article VIII of said decree was intended and agreed by all parties to mean that in making apportionments to the Upper Valley Users, after the apportionment made on January 1 of each year, the Water Commissioner should take into account and make apportionments to said Upper Valley Users equal to *all* water running into the reservoir since the date of last apportionment and available for release through the gates of Coolidge Dam, after appropriate deductions for seepage and evaporation, in accordance with the plan approved by the Secretary of the Interior as set forth in Petitioners' Exhibit No. 2, and so as to enable said Upper Valley Users to continue the use of water as they had theretofore used the same prior to the passage of the San Carlos Act. The full substance of said testimony further shows that it would be impossible under the manner of apportionment theretofore used by the Water Commissioner and

approved by the court to enable said Upper Valley Users to continue the use of said waters as they had theretofore used them prior to the passage of the San Carlos act.

That the objection urged to said testimony was:

> "MR. FLYNN: As I understand it, it is merely an offer, and of course we would like to have the record show our objections to it, on the ground that it is immaterial and irrelevant. Of course, without knowing what it is, I am not familiar with the testimony, and there may be many grounds on which it is objectionable in addition to the fact that it is not admissible for the purpose of varying or determining the judgment and decree of this Court, that is, that the judgment of this Court is clear and plain and therefore any oral testimony or any testimony whatsoever would be inadmissible to explain or change it for the purpose of interpreting the decree. That is our objection. Now, as we say, it might be immaterial for other reasons, but even if the testimony were admissible for that purpose, this testimony probably would be objectionable on the ground it would not help to determine the decree of this Court, which is not ambiguous so we would like to reserve all these objections and exceptions to the offer, and it is my understanding that it is made for the purpose of the record, and we have no objection to it being made in this way. Of course, if admitted in evidence, we would object because we would want an opportunity of cross-examination." (Tr., Vol. I, pp. 34-35.)

As to the proffered testimony of the witness McGrath, this further objection was made:

> "MR. FLYNN: I think, as to this offer, we would like the additional objection that it largely consists of opinions and conclusions of the witness, in addition to those other objections which have been made to the offer of any testimony." (Tr., Vol. I, p. 105.)

The objections to all proffered testimony were sustained by the court. (Tr., Vol. I, p. 105.)

SUMMARY OF THE ARGUMENT

We have made three Specifications of Error. Summarized, our argument under these Specifications is as follows:

1. Basically, it is our contention that the decree provides that the Water Commissioner shall, in making apportionments to the Upper Valley Users, after the first apportionment made on January 1 of each year, take into account and apportion to said Upper Valley Users an amount of water equal to *all* water running into the reservoir since the date of the last apportionment and available for release through the gates of Coolidge Dam, less an appropriate deduction for evaporation and seepage.

2. That if it be held that the decree does not provide that the Water Commissioner shall make apportionments to the Upper Valley Users, as set forth in the preceding paragraph, then it must be held that the pro-

visions of Article VIII of the decree, relating to stored water and apportionments to the Upper Valley Users, are not clear, but are ambiguous.

3. That if it be held that the decree is not clear and is ambiguous, petitioners were entitled to introduce evidence to clarify the decree and explain its meaning and to show the court the intention of the parties at the time the decree was agreed upon and entered.

We will argue these propositions in the order they are set forth above.

ARGUMENT

SPECIFICATION OF ERROR NO. 1

In order to properly present our position, it is necessary to refer briefly again to the facts leading up to the entry of the decree.

It appears from the decree itself (Tr., Vol. II, p. 15) that some of the Upper Valley Users had been using the waters of the Gila River for the purpose of irrigating their lands from as far back as the year 1872. So far as the record discloses, there had never been any controversy between the Upper Valley Users and the Indians concerning the right to use the water until this original action was instituted. There is nothing to indicate that it had ever before been contended on the part of the Indians that the Upper Valley Users were not entitled to use the waters exactly as they had been using them since the year 1872.

On June 7, 1924, Congress passed the San Carlos Act, authorizing the construction of the Coolidge Dam. Notwithstanding the contention that the government made in this litigation to the effect that the Indians had appropriated and had a prior right to the use of water from the river for the irrigation of approximately fifty thousand (50,000) acres of land, it was recognized by Congress in the Act itself that the Indians were then without an adequate supply of water. The first paragraph of the Act provides:

> "That the Secretary of the Interior, through the Indian Service, is hereby authorized to construct a dam across the canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos Irrigation project . . . for the purpose, *first,* of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, *now without an adequate supply of water* and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the Secretary, can be served *with water impounded by said dam* without diminishing the supply necessary for said Indian lands." (Italics ours.)
>
> United States Statutes at Large, Vol. 43, page 475—June 7, 1924.

It seems plain from this statement that Congress recognized that the Upper Valley Users had made a lawful appropriation of the waters of the river and that the Indians therefore had no "adequate supply" for their lands and that it was the purpose and intent

of Congress, in passing the Act, to provide a supply of water for the Indians by impounding flood waters. There is certainly nothing in the Act that would indicate that Congress intended to interfere with the old and well-established rights of the Upper Valley Users. That this was the position of the government at that time is further borne out by the arrangement approved by the Secretary of the Interior and reduced to writing, and later incorporated in the decree as a part of Article VIII, which provision we will later discuss in detail.

After the San Carlos Act was passed, this original suit was instituted on October 3, 1925. It was there asserted, and so far as this record shows for the first time, that the Indians had extensive rights alleged to be prior to the rights of the Upper Valley Users. This contention was disputed by the Upper Valley Users and with the controversy in that status, at a conference held in Washington before Secretary Wilbur of the Department of the Interior, attended by representatives of the government and the various irrigation districts on the river, a plan for compromising the controversy was proposed and reduced to writing. (Petitioners' Exhibit No. 2, Tr., Vol. I, pp. 85-87.) That writing provides that in order to reach a fair and equitable settlement of the matter and to avoid further litigation, a plan had been formulated, providing, among other things, that the rights of the Indians should attach to and be first satisfied out of the flood waters to be stored in the reservoir and that unless and until stor-

age was provided on the upper river for the irrigation of the lands of the Upper Valley Users, they should be entitled to continue the diversion and use of the waters of the river to the extent that they were being used and enjoyed in 1924 when the San Carlos Act was passed.

It was pursuant to this plan that the litigation was compromised and the decree entered in the case. The decree itself, Article VIII, (Tr., Vol. II, page 106) carries forward and incorporates this provision of the plan to the effect that the Upper Valley Users should be entitled, in disregard of any rights of the Indians, to continue the use of the waters of the river as they had therefore used them prior to the passage of the San Carlos Act.

It must be borne in mind that the decree entered was a consent decree, the consent of the Upper Valley Users to its entry being based, as shown by Article VIII, upon the provision that they were to be permitted to continue to use the waters of the Gila River as they had theretofore used them prior to 1924. There was, of course, no formal trial or adjudication of respective rights and priorities. What is set down in the decree is wholly the result of a compromise and agreement reached by the parties themselves. The court was not called upon to inquire into and adjudicate the respective priorities of the parties. The preamble of the decree shows that it is nothing but a compromise agreement. (Tr., Vol. II, page 6.) In interpreting the decree, the court should therefore take into consideration the facts and circumstances surrounding its entry

and keep in mind the respective contentions of the parties and the fact that the decree is an agreement, rather than a formal adjudication entered pursuant to a trial on the merits.

The decree, being a consent decree, must be interpreted in the same manner as though it were a contract. This rule is supported by later citations in this brief. That this court should take into account the facts and circumstances surrounding the entry of the decree is equally clear from the statement of the Supreme Court of the United States in the case of *Reed v. The Merchants Mutual Insurance Company of Baltimore,* 95 U. S. 23, 24 L. Ed. 348, 349, where Mr. Justice Bradley, speaking on behalf of the court, says:

> "Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities."

Had the matter been litigated and the various priorities of the parties determined as a matter of law and of right, there would have been no occasion for this lengthy decree. The various rights and priorities of the parties set up in the priority schedule of Article V would have been substantially all that was necessary for the decree to contain.

With the foregoing facts in mind, we will proceed to an analysis of the decree.

Analysis of Decree

The decree consists of thirteen articles, each dealing with some different phase of the matter. These articles must, of course, be construed so as to give effect to all of them, and necessarily what is said in one article is modified by what is contained in the others.

Since the right given the Upper Valley Users to disregard priorities under the terms of the decree is defined in Article VIII and this controversy revolves around the provisions of that article, we deem it proper to analyze it before attempting to analyze the other articles of the decree.

Article VIII

(Tr., Vol. II, pp. 106-7.)

(This Article printed Appendix, pp. 20-27.)

This article is the most important provision of the decree as it relates to this controversy, because it applies wholly to the manner in which the Upper Valley

Users are to be permitted to use the waters of the stream. Other portions of the decree are important here only insofar as they throw light upon the meaning of this particular article.

This article makes provision for diversion and use of the waters of the river in *disregard* of the Priority Schedule. It is devoted to setting out what was agreed to be given the Upper Valley Users in consideration for their consenting to the decree. These Upper Valley Users conceded to withdrawing their contentions with regard to priorities as set forth in their pleadings in the case, and permitted the plaintiff to set up a prior right to a quantity of land almost equal to the total of the entire land of the Upper valleys, *but only upon the condition, as stated in this article, that they were to be permitted to use the water as they had theretofore used it.*

The first paragraph of the article sets forth what had been agreed upon so far as the rights of these defendants to divert the waters of the river are concerned. It starts out by saying that the rights of these defendants are junior to the rights of the plaintiff which are set down and referred to in the Priority Schedule, but further identified and particularly described in Articles VI and VII of the decree. It then provides (reading from Tr., Vol. II, page 106):

> "that, however, plaintiff and said defendants, in recognition of the desirability of making it *practicable for said defendants to carry on the irrigation of said Upper Valley lands to the extent to*

> *which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled, have agreed* that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them." (Italics ours.)

In other words, in order to induce these defendants to agree upon a settlement and thus avoid the necessity of litigating the issue, it was agreed between all the parties that the Upper Valley Users were to be permitted to carry on the irrigation of their lands to the same extent to which they had theretofore been irrigated. It sets forth that this agreement is made in recognition of the desirability of making it practicable for these users to so carry on the irrigation of their lands, and in order that a compromise and settlement might be reached. It required no further language to vest that right in the defendants, and if the language following that agreement, which was inserted in the decree for the purpose of carrying the agreement into effect, is to have placed upon it the construction contended for by the plaintiff, the court would obviously be construing the language in a manner to prevent the carrying out of the contract, rather than construing it in a way to put it into effect. Courts will, of course, always construe language so as to produce the result

obviously intended by the parties, rather than to defeat it.

See:

17 C. J. S., p. 689, para. 295 (a); p. 707, para. 297;

Christian v. Waialua Agr. Co. et al., 93 Fed. (2nd) 603-615 (Ninth Cir.).

The obvious purpose of Paragraph (2) of this article (Tr., Vol. II, p. 106) is to set up the machinery or means of carrying into effect what was agreed to between the parties in the first paragraph, namely, the right of the Upper Valley Users to use the water as they had theretofore used it, although such use necessarily meant disregard of certain of the rights of plaintiff as set up in the preceding articles. This paragraph starts off with the following provision:

> "That on the first day of January of each calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage, and shall permit the diversion of said amount of water from said

> stream into the canals of said defendants for the irrigation of said Upper Valley lands in *disregard* of the aforesaid prior rights of plaintiff used on lands below said reservoir;" (Italics ours.)

It will be observed that the water which the Commissioner is to apportion to these users is such stored water as "is available for release through the gates of Coolidge Dam for conveyance down the channel of the river and for diversion and use on the lands of the San Carlos Project for the irrigation thereof." The reason for the use of the words "available for release" is due to the fact that there is a certain amount of dead storage in the reservoir, and of course until the water had run in sufficiently to come up to the point where it could be released, it could not be "available" for use on the Lower Valley lands and hence, until that point was reached, Upper Valley Users would not be entitled to an apportionment. However, when water has run into the reservoir, which is available for release, then the Commissioner is required to make an apportionment to the Upper Valley lands and permit diversion of the amount of water so apportioned, "in *disregard* of the aforesaid prior rights of plaintiff used on lands below said reservoir." This must, of necessity, mean that such apportionment is to be made without regard to plaintiff's rights set up in the Priority Schedule.

This paragraph further provides (quoting from Tr., Vol. II, p. 106):

> "the diversion of said amount of water by said defendants to be in accord with the priorities *as*

between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree;" (Italics ours.)

The court will note that it is provided in the foregoing quoted language that the diversion and use of the amount of the water apportioned to Upper Valley Users is to be used in accordance with the priorities, *as between themselves, stated in the Priority Schedule,* but it is not provided that it shall be used with any regard to the prior rights of the plaintiff as stated in said Schedule. This for the reason that the preceding portion of the paragraph has already provided that Upper Valley Users' diversion and use of the water shall be "in disregard" of plaintiff's rights. This language also shows that not only is the apportionment to be made in disregard of plaintiff's rights, but that the Upper Valley Users are to be permitted to take the water from the stream in disregard of plaintiff's rights.

This paragraph further provides (Tr., Vol. II, p. 106):

"that if and when at any time or from time to time in any year, water shall flow into said reservoir

> after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply;"

Here reference is made to "available stored water," and it is provided that the Commissioner shall make additional periodical apportionments of such available stored water whenever it flows into the reservoir and becomes added to the available stored water supply. Again the term "available stored water" is used for the reason that the Commissioner would have no right to make an additional apportionment to the Upper Valley Users unless the waters running into the reservoir were available for release and use by the Lower Valley lands. Not all water running into the reservoir is subject to apportionment, but only such water as runs in and can be released for use on the Lower Valley lands. It is easily conceivable that water might flow into the reservoir and be added to the dead storage and still not be available for release. The same would be true of water running into the reservoir when it was full and the water was running over the spillway. In such case, the incoming water would likewise not create available storage. Under such circumstances, no appor-

tionment could be made, and it was for this reason that the word "available" had to be used.

Any water running into the reservoir becomes stored water. The lake is several miles in length and it would be impossible to convey the stream running in, through the water then in storage, out of the lake. The mere fact that an equivalent amount of water may be withdrawn at the same time as the new waters running in, does not prevent the incoming water from being stored water. It is there, stored in the reservoir, and is added to the water already stored there, and if conditions are such as to make the water available for release, it becomes added to the available stored water in said reservoir. If a man has grain in storage and pours in a quantity at the top of the elevator and at the same time takes out a similar quantity from the bottom of the elevator, it surely cannot be said that the new grain is not an "accession" and is not added to the old grain that was stored in the elevator.

The above quoted language of necessity means that the subsequent apportionments made after the first annual apportionment must take into account all water flowing into the reservoir and available for release without regard to whether or not Lower Valley Users have seen fit in the meantime to withdraw and use the water as fast as it has flowed into the reservoir. If apportionments are subject to plaintiff's control and can depend upon whether or not plaintiff sees fit to leave the water in the reservoir, then use of the waters by the Upper Valley Users could not be "in disregard"

of plaintiff's rights. Under the construction of the decree adopted by the District Court, except in flood periods, no water can be apportioned to the Upper Valley Users unless plaintiff sees fit to leave water in the reservoir sufficient to raise the lake level. Under such construction, apportionments to Upper Valley Users are under the control of the plaintiff and clearly not "in disregard" of its rights. Whereas, under the construction Upper Valley Users are contending for, when the water runs into the lake, they are entitled to the apportionment of an equivalent amount and the right to use the same without regard to whether or not the plaintiff sees fit to permit the water to remain in the reservoir.

Quoting further from said paragraph, (Tr., Vol. II, pp. 106-7), it is provided:

> " . . . that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commissioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand. . . . "

This provision specifically instructs the Commissioner as to what deductions may be made in arriving at the amount of the periodical apportionments. It authorizes deductions for losses from evaporation and seepage, and nothing more. Obviously, had it been intended that the Commissioner was also to deduct all water that had been withdrawn in the meantime by the plaintiff for the proper irrigation of eighty thousand acres of Lower Valley lands, this deduction would have been included with the others, because it is of far greater consequence. It seems absurd that a deduction for such minor matters as loss from evaporation or seepage would be specifically mentioned and included, and a major deduction such as that made by the Commissioner for waters withdrawn by the plaintiff would be omitted, unless it had been intended that such waters so withdrawn were not to be deducted in making the apportionments.

The second clause in the above-quoted portion provides that periodical apportionments made by the Commissioner shall correspond with "net accessions" during each annual period after the first apportionment, provided accessions "have occurred." "Net accessions" means such water as had run into the reservoir and is available for release, less the deductions that the Commissioner is authorized to make in the preceding sentence, namely, deductions for evaporation and seepage, and nothing more. After these deductions have been made, what is left is the "net accession." And it is obvious, from the language used, that the water does not

have to remain in the reservoir. The language merely provides that if such accessions "have occurred" during the period, they shall be included in the next apportionment.

This paragraph goes on to say that the apportionments made by the Commissioner for any calendar year shall not carry over or be available for the succeeding year. It was for this reason that Paragraph 4 of this article (Tr., Vol. II, p. 107) was inserted, providing that if the plaintiff withdraws water in a quantity greater than is allowed for the proper irrigation of eighty thousand acres, such excess shall be considered as stored in the reservoir for the purpose of arriving at the amount of the first annual apportionment. In other words, this was a safeguard so that the Upper Valley users would be assured of having some apportionment at the beginning of each calendar year, in order to entitle them to begin using the water without waiting for that year's supply to start flowing into the reservoir.

This paragraph also provides (Tr., Vol. II, p. 107):

> " . . . that the diversions made by said defendants of the natural flow of the Gila River thus apportioned to them *in disregard* of said prior rights of plaintiff, shall be regulated by the Water Commissioner . . . in accord with the rights and priorities accredited to each of said defendants in said Priority Schedule." (Italics ours.)

This again makes it apparent that the Priority Schedule is applicable only as among the Upper Valley Users

themselves, and that the apportionments to be made to them by the Water Commissioner are to be "in disregard" of plaintiff's prior rights and not in accord with its rights set up in the Priority Schedule as against these users. This also shows that it was intended that both apportionments and diversions were to be made by Upper Valley Users *in disregard* of plaintiff's prior rights.

This paragraph further provides (Tr., Vol. II, p. 107):

> " . . . provided always that such diversions shall be limited to the amount of water then apportioned, as aforesaid, and in any event, during each irrigation season, do not and shall not exceed the total amount of water called for under the right accredited in said Priority Schedule to any given defendant, namely: 6 acre feet per acre for the irrigation season as defined in Article V hereof; and provided further that the drafts on the stream by the upper valley defendants shall be limited to a seasonal year diversion which will result in an actual consumptive use from the stream of not to exceed 120,000 acre feet of water; . . . "

In the light of this provision, we call the court's attention to the fact that the right being asserted by these users is not as broad as it appears on its face. Under the decree, they are limited to 6 acre feet and have a further and more restrictive limitation, in that the entire lands in the Upper Valleys, consisting of approximately 40,000 acres, are limited to a total con-

sumptive use of 120,000 acre feet per year. There is a further practical limitation of great importance, and that is, that regardless of what amount of water may be apportioned to these users they can only take such part of it as may be available in the stream, which is frequently entirely dry, during the time the apportionments exist, whereas the Lower Valley lands are always assured of their water before anything can be apportioned to the Upper Valleys.

The decree further provides, and it was agreed, that the construction of the dam was to inure in part to the benefit of these users. Under the limitations that have been pointed out and operated under the construction approved by the lower court, it is difficult to see how the construction of the dam inured to the benefit of these users. Prior to its construction they were using the water at will. Now, according to plaintiff's contention, they are using it at the will of the Lower Valley Users.

Paragraph 5 of this article (Tr., Vol. II, p. 107) provides that if, by reason of lack of available storage in the reservoir, no apportionment can be made to these users, or as soon as they have used up such apportionments as have been made, that then and in that event they can no longer use the water in disregard of the plaintiff's rights, but shall use it in accordance with the rights of the parties set up in the Priority Schedule. If it had not been intended that Upper Valley Users were entitled to disregard the prior rights of plaintiff

during such times as there was any water to apportion, this provision of the decree would be meaningless.

Most of Paragraph 6, Article IX (Tr., Vol. II, p. 110) and Paragraph 3 of Article X (Tr., Vol. II, p. 111) are devoted to expressing exactly the same proposition showing again that it was intended that priorities of the Lower Valley Users would be disregarded so long as there was available water for apportionment.

Under the plaintiff's construction, these two provisions of the decree would be equally as meaningless as sub-paragraph 5 of Article VIII.

There is a further provision in Article IX (Tr., Vol. II, p. 109) that:

> " . . . if there is any natural flow in the Gila River at the point where said stream enters the San Carlos Reservoir, so much thereof—will be allowed to flow through said reservoir into the channel below."

(This is limited for the purpose of supplying Kennecott Copper Company.)

Here is a specific provision, and the only one in the decree for passing natural flow water through the reservoir.

If it was intended, as plaintiff contends, to pass the so-called natural flow through the reservoir for the use of plaintiff under its prior rights, it seems peculiar that no provision similar to this was made in Article VIII, since the amount of water going to plaintiff is of far greater importance than the small quantity going to Kennecott Copper Company.

The court will also find in Article IX and X (Tr., Vol. II, pp. 108-111), providing for the comparatively small quantities of water to be used by Kennecott Copper Company and by Anderson, Herring, and Glasspie, that the "natural flow" of the river is defined and is computable. The reason it is defined in these articles is because it is material to their rights. However, no definition of the natural flow is attempted in connection with the rights of plaintiff because, under the terms of the decree, it is not material as to their rights. If the term were obvious and computable for the San Carlos Project, it would not have to be defined for these other parties.

The foregoing is the contention of the Upper Valley Users with respect to the interpretation that should be given to Article VIII of the decree. It is the position of the Upper Valley Users that nothing contained in the other articles of the decree in any way militate against such interpretation, but on the contrary strengthen it. In order to make our position clear in this respect, we will proceed to an analysis of the other articles of the decree.

Articles I, II, III and IV

(Tr., Vol. II, pp. 6-11.)

These articles deal with parties, dismissals and withdrawals, and matters of that character that have no bearing on this controversy, with exception of the preamble (Tr., Vol. II, p. 6; Appendix, p. 1) which does

point out, as is recognized throughout the decree, that it is a consent decree entered into for the purpose of settling all of the issues between the parties without the necessity of having a trial and an adjudication of them by the court.

Article V

(Tr., Vol. II, pp. 12-85.)
(This article, exclusive of priority schedule, printed Appendix, pp. 2-8)

This article points out that all of the parties named in the action have acquired and own certain rights in the use of the waters of the Gila River in connection with certain specified lands owned by such parties. Following the provisions of this article, which recite its purpose, the names of the various parties and canal companies having rights in the stream are set forth in the order of their priorities, as agreed upon, together with a description and location of their lands and their points of diversion. This portion of the decree occupies in excess of seventy pages and is referred to throughout the decree as the "Priority Schedule." In reciting the reasons for including this schedule, the article, with reference to some of the rights of plaintiff, provides (beginning with the last line Tr., Vol. II, page 12):

> "That these rights, having priorities in great number, ranging from the year 1868 to 1914 inclusive, are set down in their order in said Schedule and

totaled for each year, etc. . . . *all to the end that said rights may be identified and preserved.*" (Italics ours.)

And speaking further of the rights of the plaintiff to divert water from the river under the so-called Indian rights, it is provided that said rights (Tr., Vol. II, page 13):

"are set down and outlined in their proper order in said Schedule *as a matter of convenience, but each of said rights, furthermore, is specifically defined and decreed in later articles hereof.*" (Italics ours.)

Again speaking of the purpose of the Priority Schedule, Article V, with reference to the rights of diversion on the part of certain canal companies, says (Tr., Vol. II, page 13):

"*all to the end that the diversion rights* of said canal companies *may be adequately defined* and the individual rights of said defendant land owners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights *may be identified and preserved.*" (Italics ours.)

It is apparent, of course, that before an agreement could be made as to how the various rights of the parties were to be exercised, those rights had to be determined and set down. This, as the decree says, is for the purpose of convenience in subsequently discussing such

rights and agreeing upon the manner in which they might be exercised.

Furthermore, it must be remembered that this decree adjudicates the rights of only a part of the appropriators of water from the Gila River and its tributaries. Consequently, great care had to be exercised, and was exercised, throughout the decree to make it clear that in agreeing to the disregard of certain rights of the parties in connection with the use of the water, those rights were not being waived or surrendered *so far as third persons, not parties to the decree, were concerned.* And this reason for setting out the Priority Schedule in the decree is recited in several instances in Article V, particularly in the portions we have quoted.

That the rights of the various parties set up in the Priority Schedule were to be limited and modified by the subsequent provisions of the decree is shown by the subsequent articles providing in detail for limitations upon such rights.

It is inconceivable that the Upper Valley Users who were in court contending that the plaintiff had no rights prior to theirs, would have conceded, without even a trial of the issue, the priority of plaintiff to some thirty-seven thousand acres, if it had not been understood and agreed that the Upper Valley Users were to be permitted to use the waters of the stream in disregard of those priorities. In other words, if the Priority Schedule is the controlling factor in this decree, and the rights given to the Upper Valley Users are not to be exercised in disregard of priorities set up in the Sched-

ule as the decree specifically provides, then there was no compromise so far as the Upper Valley Users were concerned. They simply conceded the substantial part of the claims of the plaintiff without receiving anything in return. It is inconceivable that this would have been done without a trial of the issue on its merits, and when Article V is read in connection with Article VIII it becomes apparent that this is not the effect of the decree. It is clear that the priorities set up in this article are superseded by the provisions of Article VIII insofar as they conflict in any way with the right of the Upper Valley Users to take and use the water in disregard of prior rights.

Article VI

(Tr., Vol. II, pp. 86-105.)

(This article, exclusive of description of lands, printed Appendix pp. 8-18).

We have pointed out that Article V, in providing for the Priority Schedule, states that the rights of plaintiff are there set down for convenience, and in order that they may be identified and preserved, but these rights will be more specifically defined and decreed in subsequent articles of the decree.

The purpose of Article VI is to "more specifically define and decree" the rights of plaintiff, each defining some specific right of the Lower Valley Users. None of these paragraphs bear directly on this issue. (However the provision dividing the Indians' prior rights

with White lands having rights junior to the Upper Valley Users, is significant in the interpretation of Article VIII for reasons we will hereafter discuss.)

All of the rights so defined are, of course, subject to the rights of other parties as set forth later in the decree, and all constitute limitations upon the rights set forth in Article V. If there were not limitations on the rights set forth in the Priority Schedule, the arrangements set forth in Paragraph 3, sub-section (b) of the decree (Tr., Vol. II, page 92), wherein it is specifically provided that the water being divided with the White lands includes the immemorial right of the plaintiff set up in Priority Schedule, would be wholly inconsistent. In other words, such an arrangement could not possibly exist under an observance of the Priority Schedule.

Article VII

(Tr., Vol. II, page 105.)
(This Article printed in Appendix pp. 18-20)

This article is further conclusive evidence of the fact that it could not have been intended that the rights set up in the Priority Schedule were to be without limitation. Under the provisions of this article, arrangement is made for the distribution of all water to all of the lands in the entire project, except in times of scarcity, when it is provided that distribution shall be made under Article VI of the decree. But under the provisions of Article VI, it is impossbile to be on strict prior-

ities because it is provided, as we have heretofore pointed out, that some twenty-seven thousand acres of White lands are entitled to share in the waters belonging to the thirty-five thousand acres of Indian lands under their priorities set up in Article V. By this provision in Article VI, the priorities accorded the Indian lands in the Priority Schedule have been divided with the White lands, and it would be utterly impossible under any set of circumstances, whether scarcity exists or not, for the Indian lands to insists upon their full right of priority as defined in the priority schedule. That right had already been bartered away.

Actually this is not a controversy between the Upper Valley Users and the Indians. Even though the United States is plaintiff, the real parties in interest in the Lower Valley are White settlers, who were defendants in the original action and who have lands possessing water rights for the most part junior to the rights of the Upper Valley Users. Their interest in the controversy that exists now is due to the fact that they have made a contract with the Indians, providing for their use of approximately half of the Indians' prior rights on their own lands, as appears in article VI of the decree. (Tr., Vol. II, p. 92.) If the water is to be distributed according to the Priority Schedule, that agreement could not be put into effect.

The effect of this agreement, dividing the Indian waters with White lands in the Lower Valley, having rights junior to the lands of the Upper Valley Users, is to permit the disregard of the well-established prin-

ciple of water law in Arizona, that if the senior appropriator does not use the water the next appropriator in point of time is entitled to it. Prior to the entry of the decree, if we concede that the Indians had prior rights, these Upper Valley Users would have been entitled to use the water, whenever the Indians failed to use it, before it could have been used by any lands of junior White appropriators in the Lower Valley. It is difficult to believe that the Upper Valley Users would have given up this right had it been intended that Article VIII of the decree was to be interpreted as the lower court has held. On the other hand, if Article VIII is to be interpreted as we contend, and so that the Upper Valley Users receive an apportionment of all water running into the reservoir, without regard to whether it is immediately withdrawn and used by the Lower Valley Users, then this agreement to divide the Indian waters with the junior White lands would be consistent and understandable, as it would be a matter of indifference to the Upper Valley Users what was done with the water in the reservoir after they had received their apportionments. Because the effect of this agreement in the light of such interpretation would be to strip these users of their secondary right and to make 60,000 acres prior to them instead of 35,000 acres owned by the Indians.

These arguments are advanced for the purpose of showing that it was never intended that Article VIII should be interpreted as it has been by the lower court; that it would be utterly impossible to operate on the

Priority Schedule; and are in answer to any possible contention that the decree is such a decree as would be entered in a relative rights determination. No court could ever have rendered a decree containing provisions such as are set up in Articles VI, VII and VIII. Those provisions are, of necessity, the result of an agreement to disregard priorities, and could not have been inserted in the decree except upon the consent of the parties in realization of the fact that the water was not to be administered on the basis of priorities, but instead, in accordance with the agreement made between the parties. Hence, it is vital for the court to determine not what the priorities are, but what the agreement was.

Articles IX, X, XI, XII and XIII

(Tr., Vol. II, pp. 108-113.)
(Article IX is printed at pp. 27-35; Article X, pp. 35-39; Article XI, pp. 39-41; Article XII, pp. 41-43 and Article XIII, pp. 43-44 Appendix.)

Article IX defines the rights of Kennecott Copper Company to take water from the stream, and Article X defines the rights of Anderson, Herring and Glasspie to take the water accredited to them under the decree.

These articles have no direct bearing on the rights of the Upper Valley Users and are not particularly material in considering the question at issue. However, each of the articles does contain a paragraph practically identical with sub-paragraph (5) of Article VIII, by which it is again provided that, in the event

there is no apportioned water available for the use of the Upper Valley Users, then the diversions of these parties whose rights are defined in these two articles shall be made in accordance with their priorities, as the same are set forth in the Priority Schedule, showing again that the water was not to be administered upon priorities but according to agreement.

Article XI is applicable to all parties to the decree but deals with the economical and beneficial use of the water without in any way defining any particular rights of any of the parties as against any of the others. It does, however, indicate that in framing the decree, the parties had in mind the well-established principle of the water law of Arizona that all possible means must be adopted to conserve the water and apply it to the most economical use. We call the court's attention to the fact that under the interpretation of the decree, approved by the lower court, it is to the advantage of the Lower Valley Users, in times of scarcity, instead of conserving the water, to withdraw it as quickly as it runs into the reservoir, whether its use is economical or not, and in that way prevent a rise in the level of the lake, and consequently an apportionment to the Upper Valley Users. On the other hand, if the interpretation contended for by the Upper Valley Users is adopted, the incentive to withdraw water, except for economical use, is removed as it makes no difference in the amount of apportionment they will receive whether the Lower Valley Users immediately withdraw the

water or permit it to remain in the reservoir. Their rights are exactly the same in either event.

Article XII relates to the appointment of a Water Commissioner and grants the right to any aggrieved person to complain to the court and obtain a prompt review of the Commissioner's actions.

Article XIII is the concluding article of the decree and enjoins all of the parties to the decree from claiming or asserting against any other parties to the decree any rights to the waters of the river except those specified and allowed by the decree. It also provides for the retention of jurisdiction by the Court for certain limited purposes defined in said article.

Summary of Appellants' Argument on Specification of Error No. 1

Summarizing, appellants' position with regard to Specification of Error No. 1, is as follows:

1. The decree entered June 29, 1935, is a consent decree, drafted and entered pursuant to the agreement of all parties to the litigation.

2. The agreement of the parties, pursuant to which the decree was drafted and entered, is stated in substance in Petitioners' Exhibit No. 2 (Tr., Vol. I, pp. 85-87), which is the letter approved by the Secretary of the Interior and which provides that the Upper Valley Users shall be entitled to continue the diversion and use of the waters from the flow of the Gila River to the extent that such use was being enjoyed in 1924 when the San Carlos Dam was authorized by Congress.

3. That the understanding and agreement, pursuant to which the compromise was reached and the decree agreed upon, is set forth in substance in the first paragraph of Article VIII of the decree. (Tr., Vol. II, p. 106), in the following language:

> "plaintiff and said defendants, in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said Upper Valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall enure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree. . . . "

4. That in the construction of Article VIII and in determining the meaning of its provisions subsequent to the language above quoted, the court must bear in mind the general purpose of the article and so construe its language as to effectuate that purpose.

5. That under the language adopted in Article VIII for the purpose of carrying the agreement with the Upper Valley Users into effect, the decree means that the Water Commissioner shall, in making each apportionment subsequent to the first apportionment made on January 1 of each year, take into account and apportion to the Upper Valley Users a quantity of water equivalent to *all* water running into the reservoir since the date of the last apportionment and available for release to the lands in the San Carlos Project,

less an appropriate deduction for seepage and evaporation.

6. That the foregoing interpretation is the only one which will permit the Upper Valley Users to take water in disregard of the prior right of plaintiff and carry out the terms of the understanding set forth in the above quoted provision.

7. That the other provisions of the decree, when considered in light of the purpose and language of Article VIII, are not inconsistent with appellants' construction of its meaning.

SPECIFICATION OF ERROR NO. 2

The lower court held that the decree did not mean what the Upper Valley Users contended that it meant and what we have set forth as its meaning in our argument under the preceding Specification of Error. On the contrary, the court held that the interpretation contended for by appellee was correct and that the provisions of Article VIII of the decree, with respect to "stored water" were clear and unambiguous.

We do not want to be understood as taking an inconsistent position. We believe that the decree means precisely what we have contended it meant in our argument under Specification of Error No. 1. We further believe that it is impossible to read the decree and say that it clearly means what the lower court says it means without ignoring the provisions of the decree respecting the rights of the Upper Valley Users. We refer

specifically to the language of Article VIII, providing that all parties have agreed that the Upper Valley Users shall continue to use the water as they had theretofore used it prior to the passage of the San Carlos Act. There can be no question but that prior to the passage of this Act the Upper Valley Users had used the waters of the river at will and without hindrance from any source whatsoever, and without regard to any claimed right to use the waters in the Lower Valley. Their rights in this respect had never theretofore been disputed. If, as the lower court held, the language of the decree now compels them to permit the irrigation of some eighty thousand acres in the Lower Valley without receiving any corresponding apportionment for the water so used, it is plain that the provision of Article VIII above referred to must be ignored. Under this construction there is no use of the waters of the Gila River by the Upper Valley Users "in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir."

In light of the foregoing, it is our position that if the decree does not clearly mean what we have contended that it means in our argument under Specification of Error No. 1, then surely it does not clearly mean what the lower court held, but is ambiguous, and the term, "stored water," as used in the decree, is not clear, but is ambiguous and the court should have received evidence to aid in its interpretation.

SPECIFICATION OF ERROR NO. 3

After the lower court had held that the decree did not mean what the Upper Valley Users had contended it to mean, appellants offered evidence to show its true intent and meaning. The substance of this evidence, as set forth under Specification of Error No. 3, was the testimony of witnesses who represented the Upper Valley Users and were present and participated in the framing of the decree. This evidence, if admitted, would have shown that it was agreed at the time the decree was framed and entered that it was the understanding of all the parties to the litigation that the decree, as framed, meant what the Upper Valley Users are now contending that it means.

Objection was made to the introduction of this evidence upon the ground that it was immaterial, for the reason that the decree was clear and plain, and that therefore oral testimony or any testimony whatsoever was not admissible to explain or interpret it. (Tr., Vol. I, pp. 34-35.) This objection was sustained and the evidence excluded. (Tr., Vol. I, p. 105.)

The court, having refused to construe the decree in accordance with the contentions made by appellants, should surely have permitted the introduction of the proffered evidence to have established the intent of the parties and clarify the meaning of the decree. That courts will always permit the introduction of evidence to establish the intent of the parties where a contract is found to be ambiguous needs no citation of authority.

Hence if, in fact, the decree is ambiguous, the court should have permitted the introduction of evidence, showing the intention of the parties in order to arrive at its true meaning, because a consent decree in this respect is no different from a contract.

34 C. J. (Judgments) 133, Sec. 337;
Vol. 3, Freeman on Judgments, 2773;
Garrett & Co. v. Sweet Valley Wine Co., 251 Fed. 371, Dist. Ct. N. D. Ohio.

CONCLUSION

The case should be reversed with directions to the lower court to instruct the Water Commissioner to administer the decree in accordance with the interpretation contended for by appellants.

Respectfully submitted,

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APPENDIX

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DECREE

This cause came on to be heard at this term, and thereupon it was shown to the court:

That the plaintiff and the parties defendant whose claims and rights have been presented by answer or stipulation and remain for determination herein, have concluded and settled all issues in this cause as between plaintiff and said parties defendant, and as between said defendants and each of them and every other thereof, and mutually have agreed—all as evidenced, for plaintiff, by the assenting signatures, endorsed at the end hereof, of its solicitors of record and the Attorney General and Secretary of the Interior of the United States, and for said defendants, by the assenting signatures, likewise endorsed at the end hereof personally, or of their several solicitors of record—that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating their claims and rights as against each other in identical form and substance as hereinafter set forth; and the Court upon consideration thereof and of the record herein as to the disposal of the parties defendant who have been separated from the cause, and being duly informed in said premises, doth find, order, adjudge, and declare its decree herein to be as follows, namely: . . .

V

That each of the parties named in the Schedule of Rights and Priorities set out below and made part hereof (hereinafter for convenience often referred to as the Schedule or Priority Schedule), in proper person or in the representative capacity indicated, has acquired and owns the right or rights accredited to him in said Schedule; that the Gila River is the stream from which the water called for under each of said rights is and may be diverted; that the point of such diversion, the name or description of the dam, canal, or other appliance through which said diversion is accomplished and said waters are carried to the lands through the irrigation of which said right has been acquired, together with—as to individual defendants, and plaintiff where the appropriation rights of others have been conveyed to it as hereinafter further described—the description of said lands and the number of irrigable acres thereof in each quarter or quarter-quarter section, or lot or lots as the case may be, to which said right applies, are as stated in said schedule opposite the name of each of said parties in appropriately designated columns thereof; that the priority date of each of said rights is as stated for each owner in the column so designated, and such owner is entitled thereunder and as of the date of said priority to divert from the natural flow of the stream, at the point of diversion so designated and to carry and convey to, and apply to beneficial use upon, said lands for the irrigation thereof,

during each irrigation season, a total amount of water not exceeding 6 acre feet per each acre of said lands, which said amount shall not be diverted from the stream at any time during said season at a greater rate than one-eightieth (1/80) of a cubic foot per second for each acre of said lands, except as hereinafter provided; that the right of direct diversion from the natural flow of the stream for each of said parties, therefore, may be readily calculated, for the area then being irrigated, as follows:

No. of acres times 6 =Total allowable diversion in acre-feet during each irrigation season;

No. of acres times 1/80=Rate of diversion in cubic feet per second which shall not be exceeded in making said draft;

provided, however, that the water commissioner hereinafter provided for, in order to take proper advantage of sudden freshets or other periods of more plentiful natural flow in the stream, may authorize and provide for, and as to the lands of defendants above the San Carlos Reservoir shall permit, when no injury will result to others not being so accommodated, diversions therefrom under said rights at a greater rate than 1/80 of a cubic foot per second, but subject to the explicit condition that the total diversion for the lands involved shall not exceed during the irrigation season the said total of 6 acre feet per acre; that the right of each of said parties, based upon the total area involved in each

instance, is stated in acre feet per irrigation season, and in cubic feet per second (maximum rate of diversion as aforesaid), opposite the names of said party, respectively in the last two columns of said schedule; that this right for each of said parties entitles him to a first and prior call to the extent thereof upon the available natural flow of the stream as against others whose rights as listed in said Schedule bear later dates of priority than his own, while others, when their rights have earlier dates of priority than his, have a first and prior call to the extent thereof upon said stream flow as against him; that each of said rights is gauged by and limited to the amount of water which has been and can be beneficially diverted and applied to the irrigation of said lands; that this quantity is determined and adjudged herein to be the amount in acre-feet per acre for the irrigation season stated above, which shall include and be charged with all conveyance loss from the point of diversion from the stream to the lands; that said lands require that there be applied thereto, and therefore diverted from the stream, somewhat larger amounts of water in the hotter summer months of the irrigation season than at any other times therein, of which account is taken by providing herein for a considerably larger diversion right than would be required at constant even flow to produce 6 acre-feet per acre during each irrigation season; that where the figures and data given for a single water right priority are set opposite the names of more than one defendant in said Schedule, each of the same is deemed and held

to have an undivided interest in the whole there described under such mutual contractual relations as may obtain between them, which are not defined or determined in this decree; that certain of the rights accredited to plaintiff in said Schedule may be classified as rights by purchase in that they were acquired by the United States by way of conveyances from the owners of the private lands through the irrigation of which they were acquired, said conveyances being made by way of the "Agreement of Landowners to induce the Secretary of the Interior to undertake the Florence-Casa Grande Irrigation Project, and for the building and operation thereof in case the same is declared feasible" and the "Landowners' Agreement with the Secretary of the Interior, San Carlos Project, Act of June 7, 1924," entered into by the United States and such owners, which were executed and put into effect under and in connection with the Florence-Casa Grande and San Carlos Projects; that these rights, having priorities in great number, ranging from the year 1868 to 1914 inclusive, are set down in their order in said Schedule and totaled for each year under the name of the United States, with the description in each instance of the lands through the irrigation of which they were acquired by appropriation and beneficial use; also, in an appropriate column in each instance the names of the landowners making the conveyances, or their successors in interest, made formal parties defendant herein, are set down; all to the end that said rights may be identified and preserved; that plaintiff, in accord with

said agreements and conveyances, is hereby authorized and empowered to divert from the Gila River the waters called for under said rights for use by irrigation upon the lands of the Florence-Casa Grande and San Carlos Projects as hereinafter further described; that the other rights of plaintiff, which may be generally described as those owned by the United States for and on account of the Indians of the Gila River and San Carlos Indian Reservations and as reservations and appropriations made by the United States for and on account of the Florence-Casa Grande and San Carlos Projects, are set down and outlined in their proper order in said Schedule as a matter of convenience, but each of said rights furthermore is specifically defined and decreed in later Articles hereof; including the right of the United States, as of the year 1924, to store the waters of the Gila River in the San Carlos Reservoir, which is specifically defined in Article VI and is of different character than the rights directly to divert from the natural flow of the stream, with which this Article of the Decree and the Priority Schedule made part hereof primarily has to do; that certain of the rights of plaintiff, as same are set down and referred to in said Schedule, do not accumulate, as is specifically stated and described in the last paragraph of Article VI of this decree; that also certain of the rights of the Nevada Consolidated Copper Company, as same are set down in said Schedule, do not accumulate, as is specifically stated in the first paragraph of Article IX hereof; that as to all other rights to divert the waters of the

Gila River which are set down and defined in said Schedule, including the so-called rights by purchase of the United States (which for convenience here comes within the designation "concern"), when rights of different priorities are ascribed to the same person or concern, said rights as thus accredited to that person or concern do accumulate, so that the total amount of water in acre feet per season which can be taken from the stream, under the priority of any certain date and the priorities of previous dates (ascribed to that person or concern in said Schedule), with the maximum rate of diversion in cubic feet per second governing same, may and shall be ascertained by adding together the number of acre feet per season set down under each of said priorities; that maximum rate at which same can be diverted being also the sum of the maximum rates, in cubic feet per second, given under each of said dates of priority; that rights to divert the waters of the Gila River are decreed to the various canal companies and are set down under their names in the Priority Schedule as of various dates of priority; that the description in each instance of the lands through the irrigation of which said rights were acquired by appropriation and beneficial use and the names of the landowners or their successors in interest, made formal parties defendant herein (and set down under the heading "PARTIES OWNING SAID LANDS WHEN JURISDICTION ACQUIRED HEREIN"), whose beneficial application of water to said lands supported said appropriations are also listed under the names of each

of said canal companies, the amounts of water in acre feet per season, with the maximum rates of diversion, allowed for the irrigation of the various subdivisions of said lands being given in the so-called individual columns under the general heading "Diversion Right" in said Priority Schedule; all to the end that the diversion rights of said canal companies may be adequately defined, and the individual rights of said defendant landowners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved; that the irrigation season referred to in this Article of the Decree, which shall as well apply to all rights adjudicated herein, is hereby defined as and determined to be the period beginning on January 1st of each year and ending on December 31st of the same year; that the Schedule above referred to and made part hereof is as follows: . . .

VI

That plaintiff has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows:

(1) The right on behalf of the Pima and other Indians of the Gila River Indian Reservation, their descendants, successors and assigns, to divert 210,000 acre feet of the waters of the Gila River during each irrigation season, from the natural flow in said river at the Ashurst-Hayden and Sacaton diversion dams—

as of an immemorial date of priority and to the extent that such waters are available under said priority—at a rate of diversion not exceeding 437.5 cubic feet per second at any time during such season for the reclamation and irrigation of the irrigable Indian allotments on said reservation, which amount to 49,896 acres, as they now are or hereafter may be made, and of the administrative area on said Reservation which amounts to 650 acres, to the extent that the herein described water right, which is sufficient for and limited to the needs of 35,000 acres, will reclaim and irrigate the same. The waters available under this right and priority shall be divided and distributed to the lands of the Florence-Casa Grande Project as decreed and provided in subdivision (3) of this Article.

(2) The right, on behalf of the Apache and other Indians of the San Carlos Indian Reservation, their descendants, successors and assigns, to divert 6,000 acre feet of the waters of the Gila River, during each irrigation season, from the natural flow in said river at diversion points on said river within said reservation—or above the eastern boundary thereof under such rights of way as may now exist or be acquired therefor; due measures being taken to avoid injuries to other water users by said last mentioned diversions,—as of a date of priority of the year 1846 and to the extent that such waters are available under said priority—at a rate of diversion not exceeding 12.5 cubic feet per second at any time during such season, for the reclamation and irrigation of 1000 acres of the irrigable lands within

the said reservation (or in part or wholly within the valley of the Gila River above the eastern boundary of said Reservation, if lands are there acquired by the United States for that purpose), situated in the County of Graham, State of Arizona, and more particularly described as within said reservation and that portion of the valley of the Gila River above the San Carlos Reservoir and flow line thereof; that said water right, however, if or when sanctioned by law, at the discretion of the Secretary of the Interior and with the consent of the San Carlos Irrigation and Drainage District expressed by its board of directors, may be purchased by or for the benefit of the San Carlos Project and used for said project as other of that project's stream flow right below the San Carlos Reservoir are or may be used under this decree, provided, however, that such right is and shall be treated as a project right to which no individual or individual lands shall have or assert an interest or priority as against any lands given rights in the Priority Schedule; and defendants, Gila Valley Irrigation District, Virden Irrigation District and Franklin Irrigation District through their boards of directors, having offered and agreed to facilitate the aforesaid purchase of said water right so that it may be transferred and used as aforesaid for the benefit of the San Carlos Project as other of that Project's stream flow rights are or may be used below said reservoir under this decree and to pay the United States therefor the sum of Sixty-Two Thousand Five Hundred ($62,-500.00) Dollars, said payments to be made by each of

said Districts, in the proportion that the number of acres of land in said district decreed water rights herein bears to the whole number of acres of land in said three districts' so decreed water rights, and to pay said sum within two years from the acceptance of said offer, if said offer shall be accepted within five years from the date of this decree. Said offer, however, to be considered as made by said districts only when all requirements of Arizona law with regard to making binding offers of such a character shall have been complied with, it is hereby decreed that if said offer is made and accepted at said purchase price sum or at any other sum agreed upon by the said three districts and the United States, the said water right shall be transferred as aforesaid for the benefit of the San Carlos Project, but, in no event shall be used or usable or be asserted as against the lands given rights in the Priority Schedule above the San Carlos reservoir on account of which have been paid the full proportionate per acre share of the cost of said purchase.

(3) The right to divert 372,000 acre feet of the waters of the Gila River, during each irrigation season, from the natural flow in said stream at the Ashurst-Hayden and Sacaton diversion dams, as of the date of priority of 1916, and to the extent that such waters are available under said priority—at a total rate of diversion not exceeding 775 cubic feet per second at any time during such season, for the reclamation and irrigation of the 62,000 acres of the irrigable lands of the so-called

Florence-Casa Grande Project, or its equivalent, more particularly described as follows:

(a) The aforesaid Indian allotments now or hereafter made on the said Indian Reservation, and the said administrative area, amounting in the aggregate to 50,546 acres to the extent that thirty-five sixty-seconds of the herein described water right, which is sufficient for and limited by the needs of 35,000 acres, will reclaim and irrigate the same.

. . .

That in accord with the 'Agreement of Land Owners to Induce the Secretary of the Interior to Undertake the Florence-Casa Grande Irrigation Project, etc.' entered into between the owners of said privately owned lands and the United States, it is hereby further specifically ordered, adjudged and decreed that suitable devices for measuring the flow of water available and susceptible of being diverted by the aforesaid dam or dams to the canals of the said Florence-Casa Grande Project (now a part of the San Carlos Project system) shall be maintained and daily or more frequent measurements of said flow shall be made; that the first 300 cubic feet per second or less of water flowing in the river at the said dam or dams, available as a whole under the several rights and priorities of plaintiff, including its immemorial right described and set up in subdivision 1 of this article and the so-called rights by

purchase, and susceptible of being diverted for the said project, shall be divided and distributed, less deductions for project canal losses as hereinafter provided, sixty and six-tenths per centum thereof to the Indian lands of said project and thirty-nine and four-tenths per centum to the White lands thereof; that of the next 300 second-feet of water or less thus flowing and available, less deductions on account of losses as aforesaid, fifty-one and seven-tenths per centum thereof shall be apportioned to the said Indian lands, and forty-eight and three-tenths per centum thereof to White lands; that all water available as aforesaid in excess of said 600 second-feet shall be divided, less deductions on account of losses as aforesaid, fifty-six and one-tenth per centum to said Indian lands and to said privately owned lands, forty-three and nine-tenths per centum, except that during periods of high water when it shall be possible and practicable to divert water for the use of the Indian lands within said project, or some of them, by means of the Sacaton Dam, the entire amount of water diverted for the said project by the said Ashurst-Hayden Dam shall be used for the irrigation of privately owned lands and of such of said Indian lands as cannot be adequately supplied from said Sacaton Dam; that furthermore the amounts of water thus apportioned to the White lands within said project shall be distributed to said lands in the following order:

(a) Certain of said lands to the extent of some 9,752.83 acres together with 790 acres in Sec-

tions 1 and 2, Twp. 5 S., Range 8 E., G. and S. R. B. and M., being identical with those tracts which are described in the Schedules of Rights and Priorities set out under Article V hereof and identified in said article as applying to the so-called rights by purchase of plaintiff, shall have a call upon the waters available under such apportionment in the order of their priorities as set out in said schedule.

(b) The remainder of said lands, amounting to some 17,247.17 acres, shall have the next three successive calls upon such waters as are available under such apportionment and in the following order:

. . .

(c) That the Secretary of the Interior or his agents in dividing the waters of the said Florence-Casa Grande Project shall see that the losses of water in the whole system of project canals (now a part of the San Carlos Project System) are shared as equitably as may be to the end that, with respect to such losses, no water right under the project shall enjoy any advantage of location, position or otherwise over any other project water right; but losses occurring in the Indian and private canals leading from said project canals shall be disregarded in the division of water

hereinabove provided for; and furthermore whenever the quantity of water diverted into the canals of said project shall, in the aggregate, be so small that, after deducting the losses of transmission in the project canals and then dividing the residue between the Indian lands and the lands in private ownership as hereinabove provided for, the share allotted to the Indian rights would be too small to reach the Indian reservation, the Secretary of the Interior, or his agent in charge of said project, shall permit all of said water to be applied to the irrigation of privately owned lands in accordance with their priorities.

(4) The right to divert 603,276 acre feet of the water of the Gila River, during each irrigation season from the natural flow in said stream at the Ashurst-Hayden and Sacaton Dams above described—as of the date of priority of not later than June 7, 1924 (and for the purposes of this decree and for them only as of said date) and to the extent that such waters are available under said priority—at a total rate of diversion not exceeding 1256.5 cubic feet per second at any time during such season, for the reclamation and irrigation of the 100,546 acres of the irrigable lands of the San Carlos Project and for supplying water to the State of Arizona, and towns, villages and municipalities of that state, and federal agencies, as provided in the Act of

March 7th, 1928, and in the so-called Repayment Contract bearing date the 8th of June, 1931, said 100,546 acres of project lands being more particularly described as follows:

(a) 49,896 acres of land within the Gila River Indian Reservation which have been, or may be allotted to individuals among the Indians thereof (also referred to herein as "Indian Lands"), together with 650 acres within said reservation comprising the School Farm, Agricultural Experiment Station and Administrative Area.

(b) 50,000 acres of land in private ownership of white persons (also referred to herein as "White Lands"), made up of such White Lands designated to come into the San Carlos Project by order of the Secretary of the Interior of April 25th, 1928, and August 9th, 1934, said designated lands being described as follows:

. . .

(5) The right, as of the date of priority of not later than June 7, 1924,—and for the purposes of this decree and for them only as of said date—to store the waters of the Gila River in the San Carlos Reservoir of the aforesaid San Carlos Project by means of the Coolidge Dam (said Reservoir and Dam being situate within the San Carlos Indian Reservation) to the extent

of the full 1,285,000 acre-feet capacity of said Reservoir at all times when said waters are available above said dam for such storage under the aforesaid priority; and the right in that relation to accomplish and control the release from said reservoir of the waters so stored and thus reduced to ownership, and to conduct the same down the channel of the Gila River to the Ashurst-Hayden and Sacaton diversion dams of the San Carlos Project and there to recapture and divert, and control the diversion of, the same by means of said dams for conveyance in the canals leading therefrom to the above described 100,546 acres of the lands of said Project for the reclamation and irrigation thereof, and for the supplementation of amounts available therefor at said dams from the natural stream flow under plaintiff's rights as same are decreed herein, and for State and Federal purposes under act of March 7, 1928 as hereinbefore described.

(6) The right, as against and only against the parties to this cause, to divert from the Gila River 17,950 acre feet of water,—for the irrigation of 2992.5 acres of Indian lands at the Gila Crossing District on said Reservation—each irrigation season at a rate of diversion not exceeding 37.4 cubic feet per second of time, from the waters occurring or recurring in said river beginning at the point where the Southern Pacific Railway crosses said river in Section 13, Township 3 South, Range 4 East of Gila and Salt River Base and Meridian or between said point and a point one hundred feet above where the Salt River empties into the Gila River,

at the diversion points on said reservation as now or hereafter located, as of the following dates of priority:

For 954 acres of said lands January 1st, 1873.
" 587 " " " " " ", 1876.
" 660 " " " " " ", 1877.
" 139 " " " " " ", 1900.
" 58.5 " " " " " ", 1903.

It is further provided that water rights with the priorities fixed as aforesaid are for the irrigation of said Gila Crossing Indian lands, but subject at all times, to all rights on said Gila River above said point hereinabove described, and provided also that said rights are subject to the right of the San Carlos project, to divert and use return flows, or water otherwise occurring in the river above said point and the right of said project to pump and otherwise interfere with and control the return flow from the lands within said project.

That certain of the foregoing rights, as listed under items (1), (3) and (4) above are inclusive one of the other so that diversions thereunder do not accumulate, and the amounts in acre feet per season and cubic feet per second stated in the 3rd item include those given in the 1st and those stated in the 4th item include those given in the 1st and 3rd; in each instance representing the total diversion allowable under that priority and those prior thereto as described in said items.

VII

That all Indian lands and all white lands now or hereinafter designated by the Secretary of the Interior

as within the San Carlos Project and under said San Carlos Reservoir shall be entitled to share equally in all of the stored and pumped water of said Project in so far as that shall be physically feasible, and said lands shall share equally in all of the water of said Project of every nature as long as the stored and unstored water supply for said Project shall be sufficient for Project needs, and as far as that shall be physically feasible; but when, through lack of stored and pumped water, there shall be an insufficient supply of water for all of the lands of said Project lying under said reservoir, which condition or fact shall be determined by the Secretary of the Interior or his duly authorized agent, the lands so situated, in addition to their proper share of such stored and pumped waters as may be available to the Project, shall be entitled to and have apportioned to them the unstored flow of the Gila River which is available as a whole, and susceptible of being diverted, for the Indian and White lands of the aforesaid Florence-Casa Grande Project together with the 790 acres in Sec. 1 and 2 T. 5 S., R. 8 E., G. and S. R. B. and M., hereinbefore mentioned, under and in pursuance of the various rights and priorities of the United States decreed herein for said lands, as follows, to-wit: said flow shall be divided between said Indian and White lands and distributed to such lands, whether the same shall be also included in the San Carlos Project or not, in accordance with the apportionment and division ordered and decreed in the third subdivision of Article VI hereof, and any surplus which may remain and be available in said river, under

the priorities of plaintiff, for other lands (beyond those of the Florence-Casa Grande Project and said 790 acres) included in San Carlos Project under the priorities of plaintiff and provisions of this decree, shall first go to such of the Indian Lands in the San Carlos Project, and then in equitable proportion to such of the private and public lands thereof as are not also included in the Florence-Casa Grande Project and said 790 acres.

VIII

That the diversions of water from the Gila River by the so-called upper valleys defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservoir are decreed herein), comprising the defendant canal companies named below, with the parties defendant named in the Priority Schedule and attached tables who are decreed rights through the canals of said companies and are served thereunder, and certain individual parties defendant who are accredited with rights to divert directly from the stream through private ditches, to-wit:

Albert Canal Company, Billingsley Extension Canal Company, Black & McCleskey Canal Company, Brown Canal Company, Colmenero Canal Company, Colvin-Jones Canal Company, Cosper & Windham Canal Company, Cosper & Windham Extension Canal Company (Under contract whereby Cosper & Windham Canal Company makes actu-

al diversion) Curtis Canal Company, Dodge-Nevada Canal Company, Duncan Canal Company, Fort Thomas Consolidated Canal Company, Fourness Canal Company, Graham Canal Company, Moddle Canal Company, Montezuma Canal Company, San Jose Canal Company, Sexton Canal Company, Shriver Ditch Company, Smithville Canal Company, Sunflower Canal Company, Sunset Canal Company, Tidwell Canal Company, Union Canal Company, Valley Canal Company, York Canal Company, York Cattle Company;

R. H. Angle, J. H. Brown, T. D. Burton, W. C. Craufurd, J. W. Foote, R. C. Gilleland, J. H. Henderson, C. C. Hester, F. E. Ross, R. Sexton, Laura Short;

and/or their predecessors in interest, for the irrigation of the lands described in said Priority Schedule made part of Article V hereof, since their inception have been made under rights which were and are junior and subject to certain extensive rights of plaintiff to divert the waters of said stream at points below the diversions of said defendants and also below the San Carlos Reservoir, which said rights of plaintiff are set down and referred to in said Priority Schedule, but are further identified and particularly described in Article VI and VII hereof, it being evidenced thereby that the earliest right of plaintiff is prior in time to all and every of the rights of said defendants, and certain of plaintiff's other rights are prior in time to certain of the

rights of said defendants; that, however, plaintiff and said defendants, in recognition of the desirability of making it practicable for said defendants to carry on the irrigation of said upper valley lands to the extent to which the areas to which their said rights apply heretofore have been irrigated and so that the said San Carlos Act shall inure in part to their benefit and this suit may be compromised and settled, have agreed that the following provisions shall be and they are hereby embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to-wit:

(2) That on the first day of January of each Calendar year, or as soon thereafter as there is water stored in the San Carlos Reservoir, which is available for release through the gates of the Coolidge Dam for conveyance down the channel of the Gila River and for diversion and use on the lands of the San Carlos Project for the irrigation thereof, then the Water Commissioner, provided for herein, shall, to the extent and within the limitations hereinafter stated, apportion for the ensuing irrigation year to said defendants from the natural flow of the Gila River an amount of water equal to the above described available storage, and shall permit the diversion of said amount of water from said stream into the canals of said defendants for the irrigation of said upper valleys lands in disregard of the aforesaid prior rights of plaintiff used on lands below said reservoir; the diversion of said amount of water

by said defendants to be in accord with the priorities as between themselves stated in said Priority Schedule and for the irrigation of the lands covered by the rights accredited to said defendants in said Priority Schedule and the quantity of water permitted to be taken by said defendants in disregard of prior rights of the United States below is in addition to and not exclusive of the rights of said defendants to take from the stream in the regular order of their priorities as shown by the Priority Schedule, but of course within the duty of the water limitations of this decree; that if and when at any time or from time to time in any year, water shall flow into said reservoir after said date of first apportionment and shall be stored there and become added to the available stored water in said reservoir, the said commissioner shall make further and additional apportionments to said defendants of the natural flow of said stream as the same is available at the diversion points of said defendants, which said apportionments shall in turn correspond with and be equivalent in quantity to the amount of such accessions or newly available stored water supply; that in calculating apportionments of the stored water supply the Water Commissioner shall make appropriate deductions for losses for evaporation, seepage or otherwise that may be suffered between the time of the apportionment and that of the diversion of a corresponding quantity of water from the stream; that such apportionments, corresponding with net accessions during each annual period after first apportionment, shall be made by said Water Commis-

sioner at least as frequently as once per calendar month (provided accessions to stored supply have occurred during that period) and at such more frequent intervals as the conditions in his judgment may demand—his decisions in these regards to be subject to summary review by the Court as provided in Article XII hereof—and said Water Commissioner shall see to it that his said apportionments, when made, forthwith shall be placed of record herein and so posted or published as to inform all interested parties in that regard with reasonable promptness and despatch; it being herein explicitly provided that no apportionment or apportionments, made during any calendar year, shall carry over or be available in any manner for the succeeding year; that the diversions made by said defendants of the natural flow of the Gila River thus apportioned to them in disregard of the said prior rights of plaintiff shall be regulated by the Water Commissioner (under the authority and powers given him by this decree and/or by such further orders of the Court as may be made in that relation) in accord with the rights and priorities accredited to each of said defendants in said Priority Schedule, provided always that such diversions shall be limited to the amount of water then apportioned, as aforesaid, and in any event, during each irrigation season, do not and shall not exceed the total amount of water called for under the right accredited in said Priority Schedule to any given defendant, namely; 6 acre feet per acre for the irrigation season as defined in Article V hereof; and provided further that the drafts

on the stream by the upper valleys defendants shall be limited to a seasonal year diversion which will result in an actual consumptive use from the stream of not to exceed 120,000 acre feet of water; said consumptive use made in any seasonal year shall be determined by adding the recorded flows at a gauging station located in the Gila River at Red Rock Box Canyon above the heading of the Sunset Canal in New Mexico and a gauging station located in the San Francisco River immediately above its confluence with the Gila River and deducting from said sum the recorded flows at a gauging station located on the Southern Pacific Railway bridge crossing the Gila River near Calva, Arizona; and the Water Commissioner shall determine what diversions are permissable and reduce diversions in the inverse order of their priorities when and to the extent necessary to accomplish the aforesaid result. The aforesaid measurements shall include the whole flow of the stream, including floods, at the three points of measurement, and no allowance shall be made for accretions or additions to the flow between the point of measurement at Red Rock Box Canyon, and the confluence of the Gila and San Francisco Rivers, and in turn between the confluence of the Gila and San Francisco Rivers, and the aforesaid gauging station at the Southern Pacific Railway bridge. Said method of measurement is adopted as sufficiently accurate for practical purposes and as better suited for administering this decree than any more refined method of determining actual consumptive use.

(3) Upon agreement made by the owner of any right set forth in the Priority Schedule for land in the Safford Valley water may be diverted by the owner of land in the Duncan Valley within the duty of water in this decree set forth and within the apportionment of water for said Duncan Valley land in disregard of such Safford Valley right or rights, and that such waiver shall in no way deprive the Safford Valley lands thus waiving of their full apportionment of water herein provided for based on water stored in the San Carlos Reservoir or their full right to take from the stream, in accordance with their priority and within the duty of water fixed by the decree as against water rights of the United States held on account of the San Carlos Project, but the right of the United States to insist upon its priorities as defined and modified herein as against Duncan Valley Lands shall not be abridged by this provision.

(4) That water released at the will of the plaintiff and for the purposes of the plaintiff from the San Carlos Reservoir at any time after the date of this decree other than for the proper irrigation of 80,000 acres of land or its equivalent in the San Carlos Project, shall be considered as stored in the San Carlos Reservoir at and after the date of such releases, and available as a basis for the above described apportionment of the natural flow to said defendants as it would be if such withdrawals had never been made.

(5) PROVIDED ALWAYS, that if by reason of lack of available storage in the San Carlos Reservoir

no apportionment of the natural flow of said river is or can be made available to said defendants, then the diversions of said defendants, of or as soon as apportionments previously made to them have been consumed, shall no longer be made in disregard of the prior rights of plaintiff below said San Carlos Reservoir, but shall instead be made under and in accord with the rights and priorities set down in Article V, and the Priority Schedule made part hereof, and Article VI of this decree to-wit: in accord with their several priorities as same are set down in said Priority Schedule and subject to the prior rights of plaintiff as same are referred to therein and further described in Article VI of this decree.

IX

(1) That the defendant Kennecott Copper Corporation shall be entitled, as of the dates of priority set down in the Priority Schedule made part of Article V hereof, for industrial, municipal, domestic and related beneficial purposes, to divert from the underground waters of the Gila River by means of its pumps, as same are or may be located within the lands described in said Priority Schedule under the heading "Point of Diversion," during the annual period beginning January 1st of each year, the amounts of water stated in said schedule, at the rate of diversion in cubic feet per second there given; subject, however, to the proviso that the total amount of water diverted and maximum rate of diversion, under the rights for such

purposes accredited to said defendant in said Priority Schedule as of the priority dates of 1878, 1879, 1880, 1884, 1885, 1887, 1890, 1895, 1906, 1908, and 1909, shall not exceed the quantity of water in acre feet per annum or rate of diversion in cubic feet per second stated for the right of 1909, to wit: 16,221 acre feet and 22.22 cubic feet per second; That the rights for industrial, municipal, domestic and related purposes accredited to said defendant as of the dates of priority named below were first initiated, and thereafter perfected, by the diversion and application of the waters of the Gila River, through canals leading from the stream, to the irrigation of those certain acreages of the lands described below which are set down opposite said dates of priority, which said dates respectively represent the year in which said acreages were first irrigated, to-wit:

That the use for irrigation under said rights, when the pumps and plant of said defendant were put in operation in the year 1909, was changed and transposed into uses for industrial, municipal, domestic and related purposes, and the waters called for under said rights and priorities, or so much thereof as was available, since have been diverted from the stream or the underground waters thereof by means of the pumps of said defendant and continuously and beneficially applied to said purposes;

(2) That the requirements of said defendant each year for the above described purposes demand that it divert from the underground waters of the Gila River, in so far as same can be made available in that relation,

at the continuous rate of ten thousand gallons per minute, or 22.22 cubic feet per second; same being equivalent by volume measurement to a maximum of 16,221 acre feet per annum; that prior to the construction of the San Carlos Reservoir and the storage of water therein the natural flow of the Gila River at and/or in the vicinity of the reduction plant and pumps of said defendant maintained an underground water plane, which when pumped from to meet the said requirements of defendant, had averaged an approximate minimum elevation, as gauged at said defendant's test well at that place, of 1920 feet above sea level (Nevada Consolidated Copper Company datum) and an approximate maximum elevation of 1930 feet above sea level (datum idem); that said diversions by said defendant then were, and since to the extent undertaken have been, made under rights which were and are junior and subject to certain extensive rights of plaintiff to divert the waters of the Gila River at points below the diversions of said defendant, and also below the San Carlos Reservoir, which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein, and further defined in Article VI and VII hereof, it being evidenced hereby that the early right of plaintiff is prior in time to all and every of the rights of said defendant and certain of plaintiff's other rights are prior in time to certain of said defendant's rights and thereby are credited with dates of priority earlier than those of said defendant; that, however, plaintiff and defendant by way of consent hereto,

in recognition of the desirability of making it practicable for said defendant to continue and further carry on its operations to the extent of its aforesaid requirements and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to-wit:

(3) That said defendant shall be entitled to divert, by means of its said pumps as they now exist or may be replaced, so much of the underground waters of the Gila River as may be available at its said pumps and as will meet its said requirements—but not to exceed the amount of 16,221 acre feet during each annual period reckoning from January 1st of each year as aforesaid, and limited to a maximum rate of diversion of 10,000 gallons per minute, viz. 22.22 cubic feet per second—in disregard of the said prior diversions rights of plaintiff below said San Carlos Reservoir as same are set out and defined in this decree as aforesaid; that if during those periods when no appreciable releases of water from the San Carlos Reservoir are being made into the channel below the Coolidge Dam, the said diversions of defendant by means of said pumps (limited to the amounts required for beneficial application to the above described industrial, municipal, domestic and related purposes and in any event to the said 16,221 acre feet per year and 22.22 cubic feet per second) shall cause the pumping water plane to fall below 1920 feet above sea

level, as gauged at said test well of defendant (Nevada Consolidated Copper Company datum), or some other mutually agreed upon point and datum, then, if there is any natural flow in the Gila River at the point where said stream enters the San Carlos Reservoir, so much thereof (or so much as is available if the amount is insufficient) as will bring the level of said pumping water plane, as gauged at said test well of defendant, or other point aforesaid, to the average of the approximate maximum and minimum elevations aforesaid to wit: 1925 feet above sea level (datum idem), will be allowed to flow through said reservoir into the channel below—if the storage level in said reservoir is high enough physically to permit its release through the Coolidge Dam—said operations to be of simultaneous character in that releases through said Coolidge Dam, equivalent to the natural flow entering the reservoir or such portion thereof as may be sufficient for the above described purpose, shall be made forthwith when it is determined (mutually by the plaintiff and defendant, or in case of disagreement by the Water Master, whose decision may be reviewed as provided in Article XII hereof) that the pumping water plane, under the conditions above described, has fallen below the 1920 foot level aforesaid; that such releases of natural flow through the Coolidge Dam shall be accomplished so as to make the most practical and workmanlike use of the amount available for the purposes thereof, taking into consideration the vital necessity of avoiding in so far as possible the waste of water into the stream below the

gravels in which the pumping water plane is being maintained;

(4) That the diversions of water from the Gila River by said defendant and its predecessors in interest for the irrigation of the lands described in the Priority Schedule for which said defendant is accredited rights for irrigation as of the dates of priority of 1908, 1916, and 1926, since their inception have been made under rights which were and are junior and subject to those certain and extensive rights of plaintiff to divert the waters of said stream at points below the said diversions of defendant; which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein and are further defined in Article VI and VII hereof, it being evidenced thereby that the early right of plaintiff is prior in time to all and every of the rights of said defendant and certain of plaintiff's other rights are prior in time to certain of said defendant's rights, and thereby are accredited with priorities which are earlier than the aforesaid rights of defendant; that, however, plaintiff and defendant, by way of consent hereto and in recognition of the desirability of making it practicable, in so far as possible, for said defendant to carry on the irrigation of its said lands to the extent of the acreages to which its said rights of 1908, 1916 and 1926 apply, and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause,

shall inure to the benefit of and be binding upon them, to-wit:

(5) That when, under the rule and method of apportionment stated in Article VIII of this decree, there is apportioned to the so-called upper valleys water users amounts of water from the natural flow of the Gila River corresponding with the available storage in the San Carlos Reservoir, then there also shall be apportioned to the defendant Kennecott Copper Corporation, from the natural flow of said river as hereinafter defined, for the irrigation of its said lands, an amount of water per acre thereof corresponding with the amount per acre apportioned to said upper valleys as aforesaid; and thereupon, said defendant shall be entitled to divert—in disregard of the said prior diversion rights of plaintiff below as same are set out and defined in this decree as aforesaid—at the points of diversions and by means of the ditches ascribed to it in the Priority Schedule, so much of the natural flow of the Gila River, limited always to the amount of water then apportioned to it as aforesaid, as can be beneficially applied to the irrigation of the lands to which said rights apply; said diversions as of course to be limited in any event to the amounts of water in acre feet per irrigation season and rates of diversion in cubic feet per second stated for said rights in the Priority Schedule; that in as much as the waters flowing in the Gila River at defendant's said points of diversion, during a great portion of the irrigation season, will be made up in large measure of stored water which has

been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the natural flow available as aforesaid to said defendant, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the natural flow of the Gila River and San Carlos River at the points where said streams enter the San Carlos Reservoir, plus such contributions thereto between the Coolidge Dam and said diversion points of defendant as may occur, but subject to such drafts upon such total as may be made by owners of rights of diversion under this decree prior to said rights of defendant (if any there are) between said Coolidge Dam and said diversion points of defendant.

(6) PROVIDED ALWAYS, that the foregoing provisions of this Article IX are hereby explicitly made subject to the proviso that whenever under Article VIII hereof, by reason of lack of available storage in the San Carlos Reservoir and the consumption of previous apportionments thereunder, no apportionment of the natural flow of said river is or can be made available to the so-called upper valleys defendants in disregard of the prior rights of plaintiff below said reservoir, and therefore diversions by said defendants and plaintiff are required to be made under and in accord with the rights and priorities set down in Article V (and the Priority Schedule therein) and VI of the decree, then the diversions of defendant, as against all the other parties in this cause, whether for industrial, municipal,

domestic and related purposes as described in subdivisions (1) to (3) above—or for irrigation as described in subdivisions (4) and (5) if or when its apportionment in that relation also has been consumed—shall be subject to and be made in accord with its priorities as same are stated in the Priority Schedule and not otherwise, saving and excepting only that its diversions for said industrial, municipal, domestic and related purposes as against plaintiff's prior rights of diversion below shall still be regulated and controlled as provided in subdivisions (2) and (3) of this Article; subject to the further proviso, however, that the natural flow of the Gila River as measured where it enters the San Carlos Reservoir, or drafts upon it in conformity with priorities against later rights above, will not be available in any event below said reservoir unless the storage level therein is sufficiently high to permit its release through the Coolidge Dam. It is further provided that the pumped diversions of said defendant when being made under subdivisions (2) and (3) of this Article, at times of greatest peak loads, may exceed by 10% the rate of 22.22 cubic feet per second stated above, if water therefor is available at said pumps, but that the total diversions for any year, January 1st to December 31st inclusive) in such event shall still be limited to 16,221 acre feet.

X

(1) That the diversions of water from the Gila River by defendants Joseph J. Anderson, Grady L.

Herring and T. H. B. Glasspie, and their predecessors in interest for the irrigation of the lands described in the Priority Schedule made part of Article V hereof, for which said defendants are accredited rights for irrigation as of the dates of priority named in said schedule, since their inception have been made under rights which were and are junior and subject to those certain and extensive rights of plaintiff to divert the waters of said stream at points below the said diversions of defendants; which said rights of plaintiff are set down and referred to in Article V hereof and the Priority Schedule included therein and are further identified in Articles VI and VII hereof, and thereby are accredited with priorities which are earlier than the aforesaid rights of defendants; that, however, plaintiff and said defendants, by way of consent hereto and in recognition of the desirability of making it practicable in so far as possible for said defendants to carry on the irrigation of their said lands to the extent of the acreages to which their said rights apply and so that this suit may be compromised and settled, have agreed that the following provisions shall be embodied in this decree, which said provisions in turn, and in so far as they affect the other parties in this cause, shall inure to the benefit of and be binding upon them, to wit:

(2) That when, under the rule and method of apportionment stated in Article VIII of this decree, there is apportioned to the so-called upper valleys water users amounts of water from the natural flow of the Gila River corresponding with the available storage in

the San Carlos Reservoir, then there also shall be apportioned to said defendants, from the natural flow of said river as hereinafter defined, for the irrigation of their said lands, an amount of water per acre thereof corresponding with the amount per acre apportioned to said upper valley as aforesaid; and thereupon, said defendants shall be entitled to divert—in disregard of the said prior diversion rights of plaintiff below as same are set out and defined in this decree as aforesaid—at the points of diversion and by means of the ditches ascribed to them in the Priority Schedule, so much of the natural flow of the Gila River, limited always to the amount of water then apportioned to them as aforesaid, as can be beneficially applied to the irrigation of the lands to which their said rights apply; said diversions as of course to be limited in any event to the amounts of water in acre feet per irrigation season and rates of diversion in cubic feet per second stated for said rights in the Priority Schedule; that in as much as the waters flowing in the Gila River at defendants' said points of diversion, during a great portion of the irrigation season, will be made up in large measure of stored water which has been released from the San Carlos Reservoir and is being piloted down the stream channel to the diversion dams and distributing canals of the San Carlos Project, the natural flow available as aforesaid to said defendants, under the limitations of said apportionment, shall be gauged by and deemed to correspond with the natural flow of the Gila River at the point where said stream enters the San

Carlos Reservoir, plus such contributions thereto between the Coolidge Dam and said diversion points of defendants as may occur, but subject to such drafts upon such total as may be made by owners of rights of diversion under this decree prior to said rights of defendants (if any there are) between said Coolidge Dam and said diversion points of defendants.

(3) PROVIDED ALWAYS, that the foregoing provisions of this Article X are hereby explicitly made subject to the proviso that whenever under Article VIII hereof, by reason of lack of available storage in the San Carlos Reservoir and the consumption of previous apportionments thereunder, no apportionment of the natural flow of said river is or can be made available to the so-called upper valleys defendants in disregard of the prior rights of plaintiff below said reservoir, and therefore diversions by said defendants and plaintiff are required to be made under and in accord with the rights and priorities set down in Article V (and the Priority Schedule therein) and VI of the Decree, then the diversions of the defendants above named, as against all the other parties in this cause—if or when their apportionment in that relation also has been consumed—shall be subject to and be made in accord with their priorities as same are stated in said Priority Schedule and not otherwise; subject to the further proviso, however, that the natural flow of the Gila River, as measured where it enters the San Carlos Reservoir, will not be available below said reservoir on occasions when the storage level

therein is not sufficiently high to permit its release through the Coolidge Dam.

XI

That the lands within the Gila River watershed for the irrigation of which rights are decreed herein are arid or semi-arid in character and require irrigation in order that crops of value may be produced thereon; that except as herein specifically provided no diversion of water from the natural flow of the stream into any ditch or canal for direct conveyance to the lands shall be permitted as against any of the parties herein except in such amount as shall be actually and reasonably necessary for the beneficial use for which the right of diversion is determined and established by this Decree, to-wit: shall be made only at such times as the water is needed upon their lands and only in such amounts as may be required under the provisions hereof for the number of acres then being irrigated; that in cases where by this Decree water is allowed to be diverted by and through any ditch by the owner thereof for another party, the terms of the contractual relations existing between them are not intended to be determined herein; that wherever the total area under a particular canal is decreed more than one water right, each having the same or different priorities or in its different parts having different rights and priorities, the total area may have used upon it all of its several rights in the order of their priorities, subject only to the requirement that no greater net draft on the stream be made

than if each right in the order of its priority were used only on the particular lands for which it was originally acquired or reserved; that rotation, which is a well known, recognized and effective practice in irrigation administration (constituting in effect the combining of flows allowed to be diverted from a given stream under two or more rights so as to provide for the alternate use of more adequate irrigation heads as between neighboring or other ditches taking from such stream), shall be permitted at all times and shall be required whenever necessary in order to obtain reasonable economies in the use of water, or in order to give to each ditch or water user a more advantageous method of irrigation, providing that such rotation shall not injuriously affect any of the rights determined or allowed by this decree; that the Water Commissioner provided for herein shall arrange for and enforce such rotation, but shall consult with, and endeavor to obtain the agreements of, such water users as in his judgment should resort thereto, and shall embody his action in this regard into such reports as he may make or be required to make to the Court herein; that if no valid objection thereto be made by other water users, an owner of any right decreed herein, when the allowable diversion thereunder in the judgment of the Water Commissioner does not constitute an adequate irrigation head for his lands, may with or without agreement for rotation, when permitted by said Water Commissioner, divert a larger head or flow into his ditch for short periods of time in lieu of the smaller flow allowed to him under his said

right, providing always that such use shall not exceed for the irrigation season the amount in acre-feet herein specified and allowed to be diverted from the stream for his lands; that appropriations and priorities of the same date rank as having rights of the same standing, and as having a simultaneous call upon the stream source in the proportion which said rights, as decreed herein, bear to each other in amounts entitled to be diverted thereunder; that any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles, to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so withut injury to the rights of other parties as the same are defined herein.

XII

That a Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch then being used by the person so disobeying or disregarding such proper orders, rules or directions; promptly reporting to the Court his said action in such case and the circumstances connected therewith and leading thereto; that when-

ever the necessities of the situation appear to the Court so to require, the Court shall authorize the employment by the Water Commissioner of such person or persons to assist that officer as to the Court may seem necessary to carry out properly the provisions of this decree and the orders of the Court; that the term of employment, expenses and compensation of said Water Commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to time make; that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly review such action or order and make such order as may be proper in the premises; that the owner or owners of each ditch or canal herein authorized to divert water from the natural flow of the Gila River for direct conveyance to and irrigation of lands, unless specifically excused by the Court or Water Commissioner, shall at his own expense install and at all times maintain at any appropriate place at or near the head of said ditch, a reliable and readily operated regulating headgate and a measuring box, flume or other device which may be locked and set in position—the same to be approved by the Water Commissioner—so that the water diverted into said ditch or canal at any and all times may be regulated and measured; that upon failure of any owner or owners to install structures of

the above described character on or before one year from the date of this decree or on or before such different day as the Court or Water Commissioner shall set or determine—after due notice from the Water Commissioner so to do—the said Water Commissioner is herein authorized to cut off diversions of water into said ditch or canal until such devices and structures shall be installed and maintained.

XIII

That each and all of the parties to whom rights to water are decreed in this cause (and the persons, estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or in-

terfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree; that nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest, under any transfer or legal succession in interest after the commencement of this action, to any of the rights hereby adjudicated; that except as hereinbefore mentioned or otherwise stated, the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not; that the several parties to this suit shall pay their own costs in this action as directly incurred or authorized by them respectively, provided that any compensation of the Water Commissioner, or amounts shown to be coming to him or the reporter, if any there be, shall be paid in such manner, at such times and by such parties as may be ordered by the Court; that the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Done in Open Court this twenty-ninth day of June, 1935.

ALBERT M. SAMES,
Judge.